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IN THE

Supreme Court of the United States

GLEN WHORTON, Director
Nevada Department of Corrections
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HON. EDWARD N. CAHN, HON. JOHN J. GIBBONS, HON. TIMOTHY K. LEWIS, HON. H. CURTIS MEANOR, HON. STEPHEN M. ORLOFSKY, HON. PATRICIA M. WALD AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT ON THE THIRD QUESTION PRESENTED

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INTEREST OF *AMICI CURIAE*

Amici curiae for Respondent on the third question presented are former federal judges and the Public Defender Service for the District of Columbia, which represents indigent criminal defendants.[1] As former interpreters and current practitioners of the law, we recognize the important place the Great Writ of habeas corpus holds in our society. We also acknowledge that the scope of the Writ has appropriately expanded and contracted throughout our history, in order to maintain its rightful role in our democratic system as the ultimate guarantor of liberty against governmental overreaching, to be used cautiously and as a last resort.

There is some disagreement among *Amici* about where Congress' recent attempt to contract the scope of habeas review, the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), fits within the historic ebb and flow of the Great Writ. There is also, quite frankly, disagreement among *Amici* about the proper resolution of the questions before the Court involving the retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004), on collateral review. Accordingly, we take no position on those larger questions.

On one issue currently before this Court, however, *Amici* emphatically agree. In amending 28 U.S.C. § 2254(d) so as to bar lower federal courts from granting writs of habeas corpus based on new constitutional rules of their own making, Congress neither directly stripped the Court of its historic power to apply new rules retroactively in habeas cases, nor transferred power to the fifty states to haphazardly determine whether and when state prisoners may raise federal habeas claims based on rules newly articulated and otherwise authorized by the Court.

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief.

In resolving the important issue presented in Question Three, *Amici* urge the Court to look to the plain language of § 2254(d)(1), the statutory scheme of the habeas statutes and the legislative history of AEDPA, all of which confirm that Congress, while motivated to curb abuses of the Great Writ, did not intend to alter the Court's power to apply new constitutional rules on collateral review. In short, *Amici* urge the Court to apply AEDPA as Congress wrote it, no less and no more.

STATEMENT OF THE CASE

Amici adopt Respondent's Statement of the Case.

SUMMARY OF ARGUMENT

As written, 28 U.S.C. § 2254(d)(1) reflects a clear Congressional intent to prevent the lower federal courts from relying on unsettled legal principles in resolving habeas corpus cases. The plain statutory language directs lower federal courts reviewing "any claim that was adjudicated on the merits in State court proceedings" to look only to the decisions of "the Supreme Court of the United States" in determining the governing law, and then to exercise additional restraint by looking only to the "clearly established" portions of this Court's decisions, rather than placing a gloss on those decisions or inferring governing rules from dicta. 28 U.S.C. § 2254(d)(1).

The statute's plain language notwithstanding, Petitioner and its *Amici*[2] argue that Congress had an entirely different objective when it amended 28 U.S.C. § 2254(d), namely, to rewrite the rules that govern *this Court's* ability to make its

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[2] Where specific *Amici* are not named, "Petitioner's *Amici*" refers to the two *Amici* supporting Petitioner on the third question presented. Notably, this group excludes the United States, which, despite acting as *Amicus Curiae* on behalf of Petitioner, has declined to endorse that portion of Petitioner's argument addressing Question Three.

decisions apply retroactively. This Court achieved a careful balance in applying new rules retroactively in habeas cases by identifying finality of a conviction—*i.e.*, when the time to petition for a writ of certiorari has expired—as the dividing line. Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), all new rules announced pre-finality must be given retroactive application. Under *Teague v. Lane*, 489 U.S. 288 (1989), all new rules announced post-finality are presumptively not retroactively applicable unless the new rule satisfies one of two limited exceptions at the core of the Writ. But Petitioner and its *Amici* assert that Congress, when it passed AEDPA, jettisoned this Court's carefully constructed retroactivity jurisprudence and replaced it with a new scheme. Specifically, they assert that § 2254(d)(1) precludes federal habeas relief "unless a State court decision is contrary to . . . *law that exists at the time the State court decision is made*." Petitioner's Br. at 44 (emphasis added); *accord* Criminal Justice Legal Foundation ("CJLF") *Amicus* Br. at 16; States' *Amici* Br. at 19, 22. In other words, Petitioner and its *Amici* argue AEDPA discards the finality dividing line of this Court's *Griffith-Teague* analysis, freezes the applicable law on habeas review to the law in existence at time of the controlling state court decision, and thus precludes the retroactive application of *any* new rules in habeas proceedings—both those new rules that come after the controlling state court decision but before finality, and those new rules that come after finality but are retroactively applicable under one of *Teague*'s two exceptions.

Perhaps appreciating the difficulty of advocating for a complete evisceration of this Court's powers to apply new rules retroactively in habeas proceedings, CJLF *Amicus* qualifies that federal habeas relief based on the retroactive application of new rules under *Teague's* exceptions (and presumably, by the same reasoning, under *Griffith*) survives at the margins post-AEDPA. According to CJLF *Amicus*, the Court's holdings articulating new constitutional rules may only be applied retroactively where a state prisoner is able to return to state

court to obtain a decision on the merits regarding the application of the new rule. CJLF *Amicus* Brief at 19, 21. For example, a petitioner who is able to return to State court to raise a claim under *Roper v. Simmons*, 543 U.S. 551 (2005), can proceed to federal court if that claim is erroneously denied, but a petitioner who is unable to obtain a state court ruling specifically applying *Roper* will be barred from obtaining federal habeas review of a pre-*Roper* appellate state court decision upholding his death sentence under the Eighth Amendment. Pursuant to this perverse and unfounded interpretation of § 2254(d)(1), state courts and legislatures would unilaterally control access to federal habeas relief for "new rule" claims, even though the very *raison d'etre* of federal habeas relief is to serve as a backstop when state courts are unwilling to enforce federal constitutional rights.

Petitioner's and its *Amici*'s position is unfounded. Indeed, all of the pertinent canons of statutory construction demonstrate that AEDPA no more allows the fifty states to haphazardly curtail, if not cut off entirely, access to federal habeas relief based on new rule claims under *Griffith* and *Teague*, than it directly overrules these pillars of the Court's retroactivity doctrine. Likewise, Petitioner and its *Amici* cannot persuasively argue that this Court's hands are tied because it has already endorsed Petitioner's interpretation of § 2254(d)(1). Indeed, far from giving any indication that its powers to articulate and apply new rules retroactively under *Griffith* and *Teague* may have been altered or eviscerated by AEPDA, the Court recently endorsed the whole of the *Griffith-Teague* analysis without reservation or limitation.

ARGUMENT

I. PETITIONER'S PROPOSED CONSTRUCTION OF § 2254(d)(1) WOULD COMPLETELY UPSET THE CAREFUL BALANCE THE COURT HAS STRUCK BETWEEN FUNDAMENTAL FAIRNESS AND FINALITY IN THE RETROACTIVE APPLICATION OF NEW RULES IN FEDERAL HABEAS PROCEEDINGS.

As discussed in more detail below, Petitioner's and its *Amici's* arguments cannot withstand scrutiny because their construction of the statute is unsupported by the pertinent canons of statutory construction, most importantly the plain language of § 2254(d)(1). But at the outset, it is important to examine the extent to which these arguments would uproot more than a century of settled habeas corpus law. Petitioner and its *Amici* argue that Congress, when it passed AEDPA and amended § 2254(d), either repealed in full the Court's power to apply new rules retroactively in federal habeas cases, or transferred that power to state courts and legislatures. Either of these arguments is historically jolting. Interpreting the statute as repealing the Court's power to apply its decisions retroactively in habeas cases would eviscerate at least 140 years of settled precedent, while construing the statute as completely transferring that historical power to the States would contravene the very principles that motivated the extension of federal habeas relief to state prisoners. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001) (rejecting argument that AEDPA and IIRIRA had restricted access to the Writ in the immigration context where such a conclusion "would represent a departure from historical practice" and legislation was silent).

State prisoners were given access to federal habeas relief in the Judiciary Act of 1867 precisely because of a perceived unwillingness by the states to ensure the enforcement of federal constitutional rights. *See* Act of Feb. 5, 1867, ch. 28,

14 Stat. 385. To be sure, the scope of federal court oversight has not remained fixed, but, through periods of expansion and contraction of the Great Writ, one thing has remained true: Neither this Court nor Congress has ever professed sufficient confidence in the state courts' administration of federal constitutional law such that federal habeas review was deemed unnecessary.[3]

Even in the more controversial area of the retroactive application of new rules, the Court retained from the outset the self-regulated power to adopt new rules and to apply them in habeas cases. As Justice Harlan noted in his influential concurrence in *Mackey v. United States*, 401 U.S. 667 (1971), the Great Writ has "been historically available for attacking convictions" on the grounds that "new 'substantive due process' rules . . . place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 692.

Thus, the Court in *Ex Parte Siebold* affirmed its authority to retroactively declare the federal statute under which the petitioners had been convicted unconstitutional, noting, "[i]f this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law." 100 U.S. 371, 376 (1879) (ultimately denying relief). In *Siebold*, the Court expressly affirmed its authority to review the petitioner's request for retroactive relief; sub-

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[3] Quite apart from federal habeas review, the federal court system as a whole owes its existence to a recognition that the state courts will always be primarily motivated by state concerns. *See* Alexander Hamilton, The Federalist, No. 80, at 429 (Warner ed. 1818) (advocating for conferring certain powers on a federal judiciary because "the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes"); 1 M. Farrand, The Records of the Federal Convention of 1787, at 125 (1911) (Madison's statement advocating for the creation of a federal judiciary).

sequent to *Siebold*, the Court entertained similar collateral challenges by state and federal prisoners, implicitly confirming this power. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (granting habeas relief based on retroactive application of new rule that statute could not be applied in manner that violated the Equal Protection Clause); *Crowley v. Christensen*, 137 U.S. 86 (1890) (considering request for retroactive determination that statute under which habeas petitioner was convicted was unconstitutional); *see also Baender v. Barnett*, 255 U.S. 224 (1921) (same); *In re Gregory*, 219 U.S. 210 (1911) (same); *Ex parte Yarbrough* ("The Ku Klux Cases"), 110 U.S. 651 (1884); *Ex parte Curtis*, 106 U.S. 371 (1882) (same).

With the expansion of the use of the Writ by state prisoners in the mid-twentieth century came confusion about the retroactive applicability of new rules. Out of fear that application of new rules in federal habeas proceedings would allow continuous litigation regarding the propriety of a state court conviction, a haphazard test was adopted, discouraging retroactive application of new rules at any point—whether on direct or collateral review. *Griffith*, 479 U.S. at 324-25 (discussing the problems with the retroactivity regime under *Linkletter v. Walker*, 381 U.S. 618 (1965)); *Teague*, 489 U.S. at 302-05 (same).

Justice Harlan argued against this approach, most notably in his dissent in *Desist v. United States*, 394 U.S. 244, 256-69 (1969), and his partial concurrence in *Mackey*, 401 U.S. at 675-702. Instead, he pressed for uniform retroactive application of rules announced while a case was on direct review, and presumptive nonretroactivity for rules announced after a conviction became final—after the opportunity to seek discretionary review from the Court had expired. *Mackey*, 401 U.S. at 679 (objecting to the practice of "[s]imply fishing one case from the stream of appellate review" while letting others "flow by unaffected").

Yet even as he proposed a dividing line affirming the Court's power to apply new rules retroactively to cases not-yet-final, Justice Harlan did not advocate stripping the Court entirely of its historical power to grant habeas relief based on new rules announced post-finality. *Mackey*, 401 U.S. at 692-93. Rather, Justice Harlan argued that "[t]he relevant frame of reference" for retroactivity analysis of post-finality new rules is "the purposes for which the writ of habeas corpus is made available." *Id.* at 682.

Justice Harlan identified two components of the core function of the Writ in *Mackey*, 401 U.S. at 692-93: (1) the recognition of "new substantive due process rules" determining certain acts are not punishable, exemplified by *Street v. New York*, 394 U.S. 576 (1969) (political expression); *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of materials the state deems to be "obscene"); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); and (2) the recognition of new rules of procedure that are "implicit in the concept of ordered liberty," exemplified by *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in criminal trials).

Justice Harlan's approach became the foundation of the Court's current retroactivity jurisprudence. "Finality," which attaches when the "Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires," was the key. *Clay v. United States*, 537 U.S. 522, 527 (2003); *accord Griffith*, 479 U.S. at 321 n. 6. Thus, in *Griffith*, the Court held constitutional rules issued while a criminal case was still on direct review or "nonfinal" should always apply retroactively. 479 U.S. at 328. And in *Teague*, a plurality of the Court endorsed a general principle of nonretroactivity for new rules issued after a petitioner's conviction became final, 489 U.S. at 299-310, but acknowledged two categorical

exceptions based on the Writ's core function. *Id.* at 310 ("[W]e now adopt Justice Harlan's view").

The first exception set forth in *Teague* ("Category One Rules") mirrored Justice Harlan's exception for rules that place certain acts beyond the power of the state to punish. 489 U.S. at 311. The second exception ("Category Two Rules") refined Justice Harlan's exception for "procedural" rules "that are 'implicit in the concept of ordered liberty,'" making it clear that this exception is "reserved for watershed rules of criminal procedure," *i.e.*, those rules "without which the likelihood of an accurate conviction is seriously diminished" and which implicate the fundamental fairness of the trial. *Id.* at 312-13 (*quoting Mackey*, 401 U.S. at 693).

The *Griffith-Teague* analysis—determining whether a state prisoner may get the benefit of a new rule by determining if his conviction was final when the rule was announced and if so, if one of the limited *Teague* exceptions for the most deserving cases apply—was the standard of retroactivity in cases on habeas review at the time AEDPA was adopted, *see Caspari v. Bohlen*, 510 U.S. 383 (1994) (analysis under *Teague* is a threshold inquiry on habeas review), and it remains so today.

II. AEDPA DID NOT LEGISLATIVELY OVERRULE OR TRANSFER TO THE STATES THE COURT'S TRADITIONAL POWER TO APPLY NEW RULES RETROACTIVELY IN HABEAS CASES.

Against this historical backdrop, the Court must analyze the arguments made by Petitioner and its *Amici* that AEDPA either (1) entirely eliminated the Court's power to apply new rules retroactively to cases in which the operative appellate state court decision predated the Court's new rule, *see* Petitioner's Br. at 41-47, States' *Amici* Br. at 19-25, or (2) transferred to state courts and legislatures the unilateral power

to determine when a state prisoner may raise a claim in federal court based on a newly articulated rule by the Supreme Court. *See* CJLF *Amicus* Br. at 19, 21. Because access to the Great Writ is considered a cornerstone of our liberty, the Court has been understandably suspicious of arguments that its habeas powers have been legislatively limited. At a minimum, the Court repeatedly has required "an unmistakably clear statement" from Congress that this is so. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006); *see also St. Cyr*, 533 U.S. at 298 ("a clear statement" is required "to repeal habeas jurisdiction"); *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996) (Court retains original jurisdiction to hear habeas petitions where AEDPA does not expressly strip power); *Ex parte Yerger*, 75 U.S. 85, 102 (1869) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law").

No such "unmistakably clear statement" appears on the face of § 2254(d)(1). Nothing in the statutory language suggests that Congress meant to divest the Court of its long-standing power to apply retroactively new rules on collateral review when it deems it appropriate to do so. In fact, the proposed construction of the statute by Petitioner and its *Amici* not only contravenes the statute's plain text, it also contravenes the structure of the habeas statutes, is unsupported by the legislative history of AEDPA, and potentially runs afoul of the Anti-Suspension Clause of the Constitution.

A. The Plain Language of § 2254(d) Preserves Intact the Court's Powers To Apply New Rules Retroactively.

The most fundamental failing of Petitioner's and its *Amici's* arguments is their lack of support from the statute's plain language. Section 2254(d) precludes habeas relief unless a state prisoner can demonstrate the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It is Petitioner's burden to show this language diminishes the Court's powers to apply new rules in federal habeas proceedings—not Respondent's burden to demonstrate this language preserves the Court's pre-existing and long-standing power. *See Hamdan*, 126 S. Ct. at 2764; *see also St. Cyr*, 533 U.S. at 298; *but see* Petitioner's Br. at 45 (asserting "[t]here is no evidence" that § 2254(d)(1) meant to adopt *Teague's* exceptions). Petitioner cannot carry this burden where, by its plain text, § 2254(d)(1) divests only *the lower federal courts* of power to issue a writ of habeas corpus based on the application of rules newly created by those courts, and leaves unchanged the Court's traditional power in habeas cases to apply new rules retroactively.

Prior to AEDPA, no substantive limits constrained the lower federal courts from granting habeas relief so long as these courts determined that the rule that they wished to apply was "dictated by precedent," *Teague*, 489 U.S. at 301– a determination these courts could make by looking to their own Circuit precedent, without regard to what the Court had said (or not said) on the subject. *See, e.g., Bell v. Hill*, 190 F.3d 1089, 1091-92 (9th Cir. 1999) (affirming reliance on circuit precedent to determine that rule not new under *Teague*); *see also Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J. concurring) (criticizing this approach). Thus, the constitutional validity of state court convictions to some degree became a function of what the lower federal courts thought the Constitution required, rather than what this Court had clearly mandated.

Section 2254(d)(1) resolved this problem by mandating that this Court is the sole arbiter of what is the applicable law on collateral review. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence"). Significantly,

§ 2254(d)(1) imposes two requirements on lower federal courts: (1) they must look to Supreme Court precedent—"law [that is] determined by the Supreme Court," and (2) they may only grant relief if the sought-after rule is "clearly established" by that precedent. The latter constraint makes clear the lower federal courts may not circumvent the limits of § 2254(d)(1) by determining that new rules have been suggested or implied by this Court's precedents. Rather, the lower federal courts reviewing a petition for a writ of habeas corpus are bound to apply only the holdings of this Court.

While § 2254(d)(1) imposes limits on the lower federal courts, it does not impose any limitation on how this Court operates. It addresses neither explicitly (as it must for Petitioner's argument to prevail) nor implicitly how or when the Court may determine what is "clearly established Federal law." Much less does it impinge upon the Court's powers under *Griffith* and *Teague*—powers that were "clearly established" within the meaning of § 2254(d)(1) at the time AEDPA was passed, *see* Point I *supra*—to adopt and make retroactive new rules in habeas cases.

Petitioner repeatedly asserts, however, that "[u]nder the plain meaning of the terms [of § 2254(d)(1)] habeas corpus relief cannot be granted unless a State court decision is contrary to . . . *law that exists at the time the State court decision is made.*" Petitioner's Br. at 44 (emphasis added); *see also id.* at 46. As a preliminary matter, it is important to note how Petitioner's interpretation of § 2254(d)(1) would radically restructure habeas litigation—especially because Petitioner and its *Amici* do not appear to appreciate the consequences of their arguments. Under Petitioner's read of § 2254(d)(1), this Court would be stripped of (1) its historic powers under *Teague* to apply retroactively a new rule issued after a habeas petitioner's conviction became final; and (2) a portion of its powers under *Griffith*, namely, the power to give a habeas petitioner the benefit of a rule issued after the

controlling appellate state court decision but before his conviction became final.[4]

CJLF *Amicus* qualifies that this Court's power to order federal habeas relief based on the retroactive application of new rules under *Teague*[5] is not entirely eliminated by § 2254(d)(1). According to CJLF *Amicus*, this power survives where a state prisoner has, after the announcement of the new rule, been able to return to state court and there obtain a decision on the merits regarding the application of the new rule; this new decision, if erroneous, then will be "contrary to or an unreasonable application of" decisional law from this Court "that exists at the time the State court decision is made." CJLF *Amicus* Brief at 19, 21. CJLF *Amicus'* attempt at a more nuanced read of § 2254(d)(1) is simply window dressing. It renders the statute's jurisdiction-stripping impact for "new rule" claims haphazard, as opposed to categorical, depending on the procedural hurdles to state collateral relief in the fifty states.[6]

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[4] The Court would still have the power under *Griffith* to apply new rules to cases on direct review, but its power to instruct the lower courts to apply that new rule to *all* similarly situated cases—those on direct review *and* those cases on habeas seeking application of a rule announced in the post-appellate decision-but-pre-finality window—would be curtailed. *But see Griffith*, 479 U.S. at 323 ("we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final."). This latter group potentially constitutes a large number of cases. In many states the operative appellate decision is issued by an intermediate appellate court, but the conviction does not become final until the time for seeking discretionary review from the state supreme court and this Court has expired. At least until now, habeas has been a backstop to ensure the proper application of new rules in these cases. *See* Point II.D, *infra*.

[5] As noted above, Petitioner and its *Amici* nowhere acknowledge the *Griffith* implications of their proposed interpretation of § 2254(d)(1).

[6] CJLF *Amicus* also submits that there will be no bar to this Court's exercise of its powers under *Teague* when a state prisoner has fully ex-

Even this distinction is likely shortlived, however, because CJLF *Amicus'* read of the statute creates an incentive for states to curtail or eliminate entirely state habeas review for new rule claims. In so doing, the states would cut off access to federal habeas review and promote the finality of convictions their appellate courts have already affirmed. Indeed, when afforded an opportunity to contract the rights of state prisoners to challenge their convictions collaterally—namely, when this Court has imposed limits on the Writ—state courts and legislatures have embraced the contraction of avenues to collateral relief.[7] The perverse incentive structure created by CJLF *Amicus'* unfounded interpretation of § 2254(d)(1) must be contrasted with Respondent's plain language interpretation of the statute, which leaves this Court's powers to apply new

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hausted his constitutional claims, but no state court has ever ruled on the merits of these claims. *See* CJLF *Amicus* Br. at 19. This scenario, however, only renders state prisoners' access to federal habeas relief based on new rule claims even more random and arbitrary.

[7] *See, e.g., Valenzuela v. Newsome*, 325 S.E.2d 370, 372-74 (Ga. 1985) (changing, in the wake of *Wainwright v. Sykes*, 433 U.S. 72 (1977), circumstances under which failure to make a contemporaneous objection constitutes a waiver); *Michigan v. Reed*, 535 N.W.2d 496, 499-501 (Mich. 1995) (noting Michigan's post-appeal relief statute is based on the federal habeas corpus statute and adopting the *Sykes* "cause and prejudice" standard); *Michigan v. Jackson*, 633 N.W.2d 825, 830 (Mich. 2001) (Michigan post-appeal relief statute imposes new limits on delayed motions for new trial and "repeated filings of such motions without any limitation period"); *Evans v. Mississippi*, 441 So.2d 520, 524, 533 (Miss. 1984) (Robertson, J. in dissent) (Objecting to over-reliance on *Sykes*, and *Engle v. Isaac*, 456 U.S. 107 (1982), and consequent evisceration of Mississippi's post-conviction means to relief, the writ of *coram nobis*: "Our eye must be affixed to justice, not slanted toward *Wainwright v. Sykes* . . . and *Engle v. Isaac*"); *Ex parte Ramirez*, 577 S.W.2d 261, 264 (Tex. Crim. App. 1979) (Recommending "to the bench and bar the discussion of the policy basis for the contemporaneous objection rule as discussed in *Wainwright v. Sykes* . . ." because federal rules regarding procedural default are "persuasive in determining what [the Texas Court of Criminal Appeals] will review . . .").

rules retroactively unchanged and maintains intact state courts' incentive to afford merits collateral review of "new rule" claims, thereby triggering federal court deference to the state courts' merits ruling.[8]

Given the radical changes that would flow from the interpretation of § 2254(d)(1) advocated by Petitioner and its *Amici*, Congress would have been required to use "unmistakably clear" language to endorse such a change and so to limit the Court's habeas jurisdiction. *Hamdan*, 126 S. Ct. at 2764. But no such clear language is found in § 2254(d)(1); indeed Petitioner and its *Amici* cannot even argue the statute freezes the applicable law for state prisoners on federal habeas review to law "that exists at the time the State court decision is made," without adding language that nowhere appears in the statute.[9]

Looking at the actual language of the statute, "clearly established Federal law, as determined by the Supreme Court of the United States," it is apparent the whole of Petitioner's plain language argument rests on a single word: "estab-

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[8] CJLF *Amicus* cites decisions following *Atkins v. Virginia*, 536 U.S. 304 (2002) as proof that state courts can be trusted with the administration of federal constitutional rights. *See* CJLF *Amicus* Br. at 21 & Appendix. But CJLF *Amicus* fails to appreciate the true import of its own argument. There is no guarantee that state courts will be so respectful of the Court's articulation of new constitutional rules in a world where the states know there is no recourse when they refuse to apply the Court's new rules retroactively. In other words, CJLF Amicus' appendix of post-*Atkins* cases simply confirms that states are more likely to comply with the Court's constitutional commands when they know that inaction or indifference will prompt federal court intervention.

[9] This language appears to be derived from the Court's discrete discussions of the meaning of § 2254(d)(1) in *Williams*, 529 U.S. at 412, and *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). But, as discussed below, *see* Point III *infra*, in neither case did the Court have a reason to question the continued viability of the *Griffith-Teague* analysis of new rules in habeas proceedings, nor did it do so.

lished." Petitioner particularly notes Congress used "the term 'established' in the past tense as a participle," thereby "*indicat[ing]* the intent to measure the correctness of a State court's decision against existing law rather than future law." Petitioner's Br. at 44 (emphasis added); *see also id.* at 43 ("this text . . . *suggests*. . . that under § 2254(d)(1) [C]ongress did not mean to adopt the *Teague* exceptions into the 'clearly established Federal law' language") (emphasis added). But, as explained above, the requirement that a sought-after rule be "clearly established" is properly read as a limitation on the power of the lower federal courts to infer new rules from the Court's dicta; it does not restrict the Court's power to articulate new rules and to apply them retroactively when it deems it appropriate to do so.

In any event, Petitioner's own hesitant language effectively concedes the weakness of its plain-text reading of § 2254(d)(1). Supposed congressional "suggestions" and "indications," Petitioner's Br. at 43, 44, are insufficient when jurisdiction-stripping legislation regarding the Great Writ is at issue. The Court has plainly stated, "[r]epeals by implication are not favored." *Yerger*, 75 U.S. at 105; *see also*, *Felker*, 518 U.S. at 660 (rejecting a jurisdiction-stripping interpretation of 28 U.S.C. § 2244(b)(3)(E)). In the absence of a "clear, unambiguous, and express statement" that Congress meant to repeal either the Court's power under *Teague* to apply retroactively a new rule issued after a habeas petitioner's conviction became final, or its power under *Griffith* to give a habeas petitioner the benefit of a rule announced after the controlling appellate state court decision but before his conviction became final, these aims cannot be attributed to § 2254(d)(1). *St. Cyr*, 533 U.S. at 299 (Congress must articulate specific and unambiguous statutory directives to effect a repeal of habeas corpus jurisdiction").

B. The Structure of the Habeas Statutes Confirms Congress Intended to Preserve the Court's Powers to Apply New Rules Retroactively.

The structure of the habeas statutes also confirms that Congress meant, in § 2254(d)(1), to preserve—not to legislatively abrogate, either categorically or haphazardly—the Court's traditional powers to apply new rules retroactively in habeas cases under *Teague* and *Griffith*. *See Tyler v. Cain*, 533 U.S. 656, 662 (2001) ("we interpret the words [of a statute] in their context with a view to their place in the overall statutory scheme.").

Section 2254(d)(1) delimits the grounds on which a state prisoner may obtain relief from the federal Courts by expressly directing that a state prisoner's "application for a writ of habeas corpus . . . *shall not be granted* . . . *unless*" it meets the requirements of § 2254(d). But before a state prisoner may obtain merits review, he must survive a number of procedural hurdles—time limitations on filing, exhaustion requirements, and obligations to develop an adequate factual foundation for the claim—contained in other provisions of Chapters 153 and 154 of the habeas statutes.

Notably, four of these gate-keeping provisions contain safety valves precisely to ensure that they will not bar claims by state prisoners based on the application of new rules deemed by the Court to be retroactively applicable.[10] Section 2244(d) imposes a one-year statute of limitations on all claims raised under § 2254(d), running from the date the state judgment becomes final, but extends that time if "the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). Similarly, § 2254(e)(2)(A)(i) pro-

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[10] Two more references to the retroactive application of new rules appear in similar gate-keeping provisions in 28 U.S.C. § 2255 governing collateral relief for federal prisoners. *See* 28 U.S.C. § 2255(5) & (8).

vides a state prisoner cannot prevail on a claim raised under § 2254(d) if he has failed to develop the evidentiary basis for his claim, but then exempts from this bar claims that rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). And § 2244(b)(2)(A) provides a second or successive petition filed under § 2254(d)(1) must be dismissed unless the state prisoner shows, "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2244(b)(2)(A). Lastly, 28 U.S.C. § 2264(a)(2) imposes an additional exhaustion requirement on the consideration of habeas claims under § 2254 by a state prisoners under a capital sentence (*see* 28 U.S.C. § 2261), but makes an exception where the failure to exhaust is "the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable." 28 U.S.C. § 2264(a)(2).

Modification of these gate-keeping provisions for claims based on newly recognized rules confirms Congress' commitment to preserving the Court's power to determine whether retroactive application of a new rule is warranted when reviewing a petition on the merits under § 2254(d)(1). By taking pains at every turn to ensure its otherwise strict standards would not impede obtaining merits review of claims based on new rules, Congress conveyed its respect for the Court's efforts to construct a workable retroactivity doctrine that achieves a balance between the sometimes competing concerns of fundamental fairness, comity, and judicial economy. Likewise, by ensuring that these gatekeeping provisions do not bar "new rule" claims, Congress indicated that it anticipates the Court will continue to apply new rules retroactively in habeas proceedings pursuant to its "clearly established" retroactivity jurisprudence.

Petitioner wholly ignores these gate-keeping provisions and thus cannot explain why, if not to ensure that the Court could under *Teague* apply (or under *Griffith* instruct lower courts to apply) new rules retroactively in habeas cases, Congress built into the structure of the habeas statutes safety-valve provisions to ensure that state prisoners can obtain habeas relief based on a new rule articulated by the Court. For their part, Petitioner's *Amici* attempt to argue that the failure of Congress to include any express reference in § 2254(d)(1), as it did in the gate-keeping provisions, to the Court's continued power to apply new rules retroactively signals that Congress wanted to eliminate this power. States' *Amici* Br. at 21-22; CJLF *Amicus* Br. at 19. This argument is unpersuasive.

As a preliminary matter, Petitioner's *Amici* have it backwards: because the Court already possessed this power, *see* Point I., *supra*, it was incumbent upon Congress to make its intentions crystal clear if it intended to eliminate this power. *See Hamdan*, 126 S. Ct. at 2764, 2766 n. 7 (requiring an "unmistakably clear statement" that jurisdiction was being stripped and rejecting the argument that "the absence of an express provision reserving [preexisting habeas] jurisdiction" is dispositive); *see also* Point II.A, *supra*.

Moreover, Petitioner's *Amici's* arguments ignore critical differences between § 2254(d)(1) and the gatekeeping statutes. There is no reason to read anything into the absence from § 2254(d)(1) language appearing in the gatekeeping statutes referencing this Court's power to make new rules retroactively applicable. Section 2254(d)(1) and the gatekeeping statutes are related but different types of statutory provisions. Section 2254(d)(1) limits substantive grounds for federal habeas relief by imposing a strict standard of review on state prisoner petitions; the gatekeeping statutes catalogue situations where state prisoners can move forward procedurally to obtain merits review under § 2254(d)(1). In the

former instance, there is no need to mention claims based on new rules if Congress had no intention of denying relief on such grounds; in the latter, express reference is required to make clear certain procedural barriers are removed where habeas relief is based on a new rule made retroactively applicable by this Court. *See Clay*, 537 U.S. at 528-31 (explaining that the difference in language between §§ 2254 and 2255 was attributable to other concerns and that, notwithstanding this difference, "final" had the same meaning).

C. The Legislative History of AEDPA Confirms Congress Intended to Preserve the Court's Power to Apply New Rules Retroactively.

The legislative history of AEDPA bolsters the plain-text and schematic interpretation of § 2254(d)(1), confirming Congress had no intent to strip, categorically or haphazardly, the Court of its "clearly established" authority to apply new rules retroactively on collateral review. *See Hamdan*, 126 S. Ct. at 2764, 2766 (legislative history contradicted government's jurisdiction-stripping argument); *Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006) (plain reading of statute consistent with legislative history). Even as he promoted the goal of curtailing abuses of the writ, Senator Hatch, one of the principal sponsors of AEDPA, endorsed without reservation this Court's power to authorize habeas relief based on the retroactive application of new rules:

> [U]nder our habeas corpus reform provisions . . . people's rights will be protected. There will be a full right of appeal all the way up the State courts, from the lowest court to the Supreme Court of the State. There will be a full right of appeal all the way up the Federal courts, from Federal court to district court to the Supreme Court of the United States, and their rights will be protected. But that is all they are going to have, unless they can show newly discovered evidence of innocence or *unless*

> *the Supreme Court applies retroactively future cases to these problems.*

141 Cong. Rec. S7479-03, S7481 (May 25, 1995) (statement of Sen. Hatch) (emphasis added).

Ignoring this express statement of intent by Senator Hatch, Petitioner and its *Amici* fail to engage in any analysis of the legislative history of AEDPA other than to vaguely assert that AEDPA was meant "to effect change in habeas practice, rather than merely to codify existing law." Petitioner's Br. at 44. It is undisputed that Congress, in passing AEDPA, sought to address what it perceived to be abuses of the Writ. But there is no evidence in the legislative history that Congress sought to do so by limiting *this* Court's powers in the way Petitioner and its *Amici* propose. To the contrary, Congress expressly designated this Court the sole arbiter of applicable federal law in habeas proceedings. *Williams*, 529 U.S. at 412.

Petitioner and its *Amici's* proposed read of § 2254(d)(1) is out of step even with the most radical proposals for habeas reform considered and rejected by Congress when it passed AEDPA. The legislative history of AEDPA reflects that there was a failed movement to impose new jurisdictional limits on federal habeas relief unless "the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." *See* 141 Cong. Rec. S7803-01, S7829 (June 7, 1995) ("Kyl Amendment"); *id.* at S7829-30, S7833 (Senator Kyl argues in favor of curtailing federal habeas review *if* state habeas review is provided). But Petitioner and its *Amici's* read of AEDPA would actually authorize and provide states with the incentive to provide "inadequate" access to state collateral review, at least for "new rule" claims, in order to cut off federal habeas review. Petitioner's proposed regime goes well beyond a rule of deference. *See Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997); *see also* CJLF *Amicus* Br. at 14. It is a jurisdiction-stripping measure

that even the most avid congressional proponents of limiting access to the Great Writ never advocated.[11]

Finally, Petitioner and its *Amici* can offer no evidence that this Court's exercise of its power to make new rules retroactive under *Teague* or *Griffith* was ever a motivating factor in the passage of AEDPA. This is hardly surprising. The *Teague* exceptions are sufficiently narrow to discourage controversial overuse. Since *Teague*, the Court has determined in only a handful of cases that certain conduct is beyond the power of the state to punish at all or punish in a certain way, *see* Point II.D, *infra*—rulings that are retroactively applicable under *Teague's* Category One exception. And the Court has yet to invoke *Teague's* Category Two exception for watershed rules of criminal procedure. Similarly, the proposition that the Court may, under *Griffith*, instruct lower courts to give the benefit of new rules to habeas petitioners who stand in the same shoes as defendants still pursuing direct appellate review—*i.e.*, those petitioners who seek the application of a rule announced after the issuance of the controlling appellate state court decision but before their convictions became final—is a matter of fundamental fairness and hardly likely to raise congressional objections.

D. The Doctrine of Constitutional Doubt Militates in Favor of the Court's Continuing Power to Apply New Rules Retroactively.

Even if Petitioner and its *Amici* could overcome the hurdles of the plain language of the § 2254(d)(1), the structure of the

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[11] Certainly the Senators who successfully opposed the Kyl Amendment would not endorse Petitioner and its *Amici's* proposed read of § 2254(d)(1). *See* 141 Cong. Rec. S7803-01, at S7832 (Senator Biden voices opposition to the Kyl Amendment because divesting federal courts of their habeas powers "creates another problem. . . . [b]ad decisions made by State courts" which prevent "people who deserve another trial" from getting one); *id.* at S7834 (Senator Specter emphasizes the important role federal courts play in protecting federal constitutional rights).

habeas statutes, and the legislative history of AEDPA and could demonstrate that their alternate reading of § 2254(d)(1) has some foundation, rejection of Petitioner's position would nonetheless be warranted to avoid construing the statute in a constitutionally questionable manner.

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible," the Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299-300 (internal quotation and citation omitted); *see also, Hamdan*, 126 S. Ct. at 2764 (avoiding constitutional problems with statute by relying on "[o]rdinary principles of statutory construction"). Petitioner's and its *Amici's* interpretation of the statute raises potentially serious constitutional problems under the Anti-Suspension Clause of the Constitution, *see* U.S. Const. art. I § 9[12]—which the Court has assumed protects "the writ as it exists today." *Felker*, 518 U.S. at 664. Specifically, under Petitioner's and its *Amici's* interpretation of § 2254(d)(1), Congress cut off access to the Writ, either categorically or haphazardly, for two special classes of individuals this Court had previously determined must have access to federal habeas relief to ensure fundamental fairness.

First, petitioners seeking the benefit of a new rule under one of *Teague's* two traditional exceptions to its general nonretroactivity rule would be denied uniform access, if not access in full, to collateral review. These narrow exceptions are limited to the most deserving cases that exemplify the core function of the Writ. *Teague's* Category Two exception for "watershed procedural rules" is a power the Court has yet to invoke but retains for exceptional cases to ensure that there

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[12] Article I, section 9 of the U.S. Constitution reads, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

is a floor of fundamental fairness in our criminal justice system. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (all criminal defendants facing the possibility of imprisonment have the right to counsel); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (criminal statutes may not be arbitrarily applied to persecute one group).

Likewise, *Teague's* Category One exceptions serve to establish a floor below which the state may not descend by prohibiting punishment of individuals for actions, or status, which have ceased to be punishable crimes. In these cases as well, the Court has exercised its power to grant retroactive relief sparingly: for example, to invalidate prohibitions regarding certain educational efforts;[13] to invalidate prohibitions regarding various modes of political expression;[14] to invalidate prohibitions regarding certain private acts within the sphere of the home;[15] or to invalidate punishment related to the status of having an illness.[16] The Court has been similarly conservative in its holdings limiting *how* certain

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[13] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (teaching school children in a language other than English); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (sending one's child to private religious school).

[14] *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag); *Street v. New York*, 394 U.S. 576 (1969) (opining that, if the government refused to protect civil rights workers in the South, "We don't need no damn flag"); *Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket bearing "Fuck the Draft").

[15] *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the use of contraception); *Stanley v. Georgia*, 394 U.S. 557 (1969) (the private possession of materials the state deems to be "obscene"); *Lawrence v. Texas*, 539 U.S. 558 (2003) (private sexual conduct between consenting adults of the same gender).

[16] *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (narcotic addiction).

classes of criminal defendants may be punished.[17] Even so, under Petitioner's interpretation of § 2254(d)(1), AEDPA would prohibit the Court from mandating the uniform retroactive application of even these sorts of new rules.

In addition to the limited class of individuals who might otherwise obtain the retroactive application of a new rule under one of the two *Teague* exceptions, Petitioner would curtail habeas review for all state prisoners seeking the benefit of any rule articulated by the Court after the operative state appellate court decision is rendered but before their convictions become "final" as defined by this Court. *Clay* 537 U.S. at 527 (2003); *Griffith*, 479 U.S. at 321 n. 6. Although neither Petitioner nor its *Amici* discusses this consequence, their proposed interpretation of § 2254(d)(1) strikes directly at the foundation of the Court's retroactivity jurisprudence where the Court carefully identified "finality" as the dividing line between automatic retroactive application of a new rule and presumptive inapplicability. *See* Point I *supra*.

This dividing line of finality was adopted precisely to ensure that the Court did not unfairly "fish[] one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permit[] a stream of similar cases to flow by unaffected by that new rule." *Griffith*, 479 US at 323 (quoting, *Mackey*, 401 U.S. at 679) (Harlan, J. concurring). Moreover, recognizing"[a]s a practical matter," this Court "cannot hear each case pending on direct review and apply [a newly created] rule," the Court "fulfill[ed] [its] judicial responsibility" and addressed fairness concerns about the disparate application of new rules "by instructing the lower courts to apply the new rule retro-

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[17] *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942) (persons who are deemed "habitual criminals" may not be sterilized by the state); *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons who are mentally retarded may not be executed for their crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles may not be executed for their crimes).

actively to cases not yet final." *Griffith*, 479 U.S. at 323. In *Powell v. Nevada*, 511 U.S. 79, 84 (1994), the Court made clear the *Griffith* finality rule was one of constitutional dimension. *Id.*

By constricting (if not cutting off entirely) habeas relief for a state prisoner who seeks the benefit of a Supreme Court ruling decided *after* the operative state court decision but *before* the time for the Court's review has expired, all the fairness concerns previously resolved by the Court in *Griffith* will come again to the fore. State prisoners whose convictions are not yet final when a new rule is announced and who are able to obtain rehearing from an intermediate appellate court or discretionary review from their state supreme court after the issuance of a new rule will get the benefit of it. Those who cannot will have to look to state collateral proceedings, but state courts and legislatures may or may not permit the prerequisite merits review of such "new rule" claims. If they do not federal habeas relief will be foreclosed. As a consequence, the haphazard application of new rules that the Court's carefully crafted retroactivity jurisprudence was designed to cure will once again become the norm. *But see Griffith*, 479 U.S. at 323 ("the integrity of judicial review requires" application of new rule "to all similar cases pending on direct review"); *Teague*, 489 U.S. at 304-05, 308-10 (reaffirming dividing line of *Griffith* rule).

To neutralize the impact of Petitioner and its *Amici's* read of § 2254(d)(1) and avoid the result where some state prisoners with *Teague* exception and *Griffith* claims are "fished out of the stream," but others are not, the Court could attempt extraordinary measures. It could open wide its doors to petitions for original writs of habeas corpus, assuming that these writs are not governed by the same strictures imposed by § 2254(d). *See Felker*, 518 U.S. at 660-61 (affirming the Court's original jurisdiction to hear habeas petitions post-AEDPA). Additionally, to obviate *Griffith* claims on habeas

review, the Court could expand its docket and try to grant direct review in every case where the Petitioner seeks the benefit of a newly articulated rule (perhaps even amending its filing rules for cases where a new rule is articulated in the days before the deadline to petition for a writ of certiorari expires and finality attaches).

This regime would be burdensome, however, even if the Court were only to issue orders granting review, vacating the state court decision, and remanding for further consideration in light of the new rule because, in a world where habeas petitioners no longer enjoy the benefit of *Griffith*, the number of petitions for certiorari likely will increase.[18] Moreover, whether it expands its own habeas review or direct review, the Court would still expend considerable resources engaged in the sort of error correction better suited to habeas review by lower federal courts. *See* 141 Cong. Rec. S7803-01, at S7835 (Senator Biden objects to Senator Kyl's argument that direct review by the Supreme Court is all the federal court review that is needed in our criminal justice system: "It is not the Supreme Court's job to take a detailed look at every State court conviction. It is the Supreme Court's job to decide weighty issues of Federal [C]onstitutional law. That is why we have [lower] Federal courts . . . [to be] safeguarders of Federal law").

No extraordinary measures need be taken by the Court and constitutional questions may be avoided, however, if Petitioner's proposed interpretation of § 2254(d)(1) is rejected, and the statute is instead interpreted in conformance with its text, the structure of the habeas statutes, and AEDPA's legislative history. Thus, the very "fact that this Court would be required

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[18] Certainly, under the Court's current finality jurisprudence it is assumed that not everyone who is entitled to the benefit of a newly articulated rule under *Griffith* is seeking this Court's direct review—because a conviction is not final until "the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527; *accord Griffith*, 479 U.S. at 321 n. 6.

to answer the difficult question of what the Suspension Clause protects is in and of itself a reason" to reject Petitioner's interpretation of § 2254(d)(1). *St. Cyr*, 533 U.S. at 301 n. 13; *accord Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (because Congress is presumed to legislate within legal limits, courts are charged with avoiding an interpretation of a statute that would render it unconstitutional or would cast grave doubt upon its constitutionality).

III. THE COURT HAS GIVEN NO INDICATION THAT ITS POWER TO APPLY NEW RULES RETROACTIVELY WAS DIMINISHED OR ELIMINATED BY § 2254(d)(1).

Although the Court has decided a number of cases post-AEDPA that have touched on the language of § 2554(d)(1) and the retroactive application of new rules, it has yet to resolve conclusively the issue presented in Question Three—as its grant of certiorari in this case confirms. Nonetheless Petitioner incorrectly argues that two of the Court's post-AEDPA precedents provide "dispositive" support for its jurisdiction-stripping interpretation of § 2254(d)(1). Petitioner's Br. at 46.

Petitioner asserts that this Court's opinions in *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2003) provide "dispositive" evidence that § 2254(d)(1) freezes applicable habeas law to the decisional law from this Court in existence "at the time the State court decision was made." Petitioner's Br. at 43, 46-47. But in both *Andrade* and *Williams*, the applicable law—what constitutes ineffective assistance of counsel and the gross disproportionality principle in sentencing, respectively—was not "new." Thus, in neither case did the Court have reason to analyze how, if at all, § 2254(d) impacts its power to apply new rules retroactively under the *Teague* exceptions (or within the *Griffith* timeframe). Nor did the Court do so. *See Williams*, 529 U.S. at 412 (noting

only "whatever would qualify as an old rule" under *Teague* "will constitute 'clearly established Federal law' . . . under § 2254(d)(1)" "[w]ith one caveat," namely, that the only source of "clearly established Federal law" is now the Supreme Court); *Andrade*, 538 U.S. at 72 (no express reference to *Teague*; observing only that "[i]n *most* situations, the task of determining what we have clearly established will be straightforward") (emphasis added).

Indeed, to the extent the Court wishes to look back to its nonbinding precedent, there are a number of cases in which it has referenced its powers under *Teague* to apply new rules retroactively in habeas cases without any indication that this power has been severely curtailed if not entirely eviscerated by AEDPA.[19] Most notably, in *Horn v. Banks (Banks I)*, 536 U.S. 266 (2002), *rev'd post-remand, Beard v. Banks (Banks II)*, 542 U.S. 406 (2006), the Court endorsed the whole of the *Griffith-Teague* retroactivity analysis for habeas cases without any mention of the supposed limits imposed by § 2254(d)(1).

Specifically, the Court held in *Banks I* that § 2254(d)(1) does not relieve lower federal courts of conducting a *Teague* analysis as a threshold matter. *Banks I*, 536 U.S. at 271. And in *Banks* II, the Court reversed again, holding the new rule in question did not satisfy either of the *Teague* exceptions for retroactive application. *Banks II*, 542 U.S. at 420. Of critical

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[19] *See, e.g., Day v. McDonough*, 126 S. Ct. 1675, 1684, 1681-82 (2006) (federal court could raise sua sponte the issue of noncompliance with one-year statute of limitations even where the state had failed to raise the issue, so as to conform to "other threshold constraints on federal habeas petitioners" including the "nonretroactivity rule announced in *Teague v. Lane*."); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (dismissing Writ as improvidently granted, *inter alia*, because it appeared that the petitioner sought the application of a new rule under *Teague* and thus, "[b]efore relief could be granted. . . we would be obliged to decide whether or how . . . [this new rule] bears on our ordinary 'new rule' jurisprudence").

importance here, the Court rejected petitioner's argument that the date of finality should be moved to render rules announced during the pendency of state collateral proceedings "old" and thus not subject to the limits of *Teague*. Instead, the Court reaffirmed the *Griffith* rule: "State convictions are final for the purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." 541 U.S. at 411 (internal quotation and citation omitted). It is difficult, if not impossible, to square the Court's adherence to the *Griffith-Teague* analysis with Petitioner's assertion that this analysis did not survive the passage of AEDPA.

CONCLUSION

For the reasons set forth above, the Court should hold that 28 U.S.C. § 2254(d)(1), as amended by AEDPA, does not abrogate the Court's authority to make new rules retroactively applicable in state prisoner habeas cases.

Respectfully submitted,

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